United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

2516

No. 24842

UNITED STATES OF AMERICA :
Appellee :
v. :
CLEOPHUS JOHNSON :
Appellant :

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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No. 24842

UNITED STATES OF AMERICA	:
	:
Appellee	:
	:
v.	:
	:
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JURISDICTIONAL STATEMENT

On August 6, 1970 in the United States District Court for the District of Columbia, appellant Cleophus Johnson was convicted of second degree burglary and grand larceny. On December 23, 1970, he was sentenced to serve from 20 months to 5 years on each conviction, the sentences to run concurrently. Notice of appeal from the final decision was filed in a timely manner and on January 4, 1971, counsel was appointed by this Court to prosecute the appellant's appeal in forma pauperis. Jurisdiction of this Court is properly invoked pursuant to the Rules of this Court and 28 U.S.C. §1291.

REFERENCE AS TO RULINGS

The denial of the appellant's motion to suppress physical evidence was made on August 6, 1970 and is found at Tr. 114. * The motion was renewed and denied at the trial on August 6, 1970 at Tr. 127. The motion for judgment of acquittal was denied by the Court at the end of the Government's case on August 6, 1970, at Tr. 129.

STATEMENT OF THE CASE

Shortly after midnight on August 10, 1969, the appellant Cleophus Johnson was arrested along with Leon Blocker, Tarrance Johnson and Wallace Threadgill. The four were subsequently charged with grand larceny and burglary in the second degree and an indictment charging both crimes was returned on October 16, 1969. (R. 1-2). Subsequently the indictment against the defendant Tarrance Johnson was dismissed when it was discovered that he was a juvenile at the time of the arrest.

For purposes of this appeal there are two significant aspects of the case which must be examined in depth: (1) the Motion to Suppress; (2) the Trial.

THE MOTION TO SUPPRESS

The defendants were arrested by members of the Metropolitan Police Department, without a warrant, shortly

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* The Motion to Suppress and trial in this case were held on the same day. All of the relevant testimony is contained in the one volume transcript filed with the Court in this case. References to pages in the transcript will be made by signifying Tr. followed by the page number.

after midnight on August 10, 1969 on Dumbarton Avenue in the District of Columbia. The police seized from the person of one of the defendants, Tarrance Johnson, and from the automobile in which they were riding items which were allegedly stolen from the Dumbarton Pharmacy earlier that night. This evidence was subsequently introduced by the Government at the trial. (Tr. 127).

The appellant filed a Motion to Suppress all of the physical evidence seized at the time of his arrest, alleging that the arrest, search and seizure were in violation of the Fourth Amendment of the United States Constitution. (R. 9-10).

The evidence adduced at the Motion to Suppress showed that at approximately 12:34 A.M. on August 10, 1969, Patrol Wagon No. 7 and Scout Car No. 71 of the Metropolitan Police Department monitored a police broadcast describing a "burglary in progress" at the Dumbarton Pharmacy in the 3100 block of Dumbarton Street. The broadcast stated that four Negro males were involved in the burglary. No further description of the four or their mode of transportation was broadcast. (Tr. 7). Sgt. Harold Johnson of the Metropolitan Police Department was a passenger in Patrol Wagon No. 7 when the radio message was received. His vehicle was within two and one-half (2-1/2) blocks of the Dumbarton Pharmacy and arrived on the scene within one to one and a half (1-1/2) minutes of receipt of the broadcast. (Tr. 8, 15). Sgt. Johnson testified that his vehicle came down Dumbarton Avenue going westerly, or the wrong way on a one-way street, at a slow rate of

speed. (Tr. 8, 10). Sgt. Johnson observed two vehicles coming from the other direction. According to his testimony, one vehicle was within 6 or 7 car lengths of the front of the Dumbarton Pharmacy. This automobile, a Plymouth bearing Maryland license plates, was occupied by four Negro males. Although the street was such that this car had to stop and pull over to let the police wagon by, Officer Johnson made no attempt to stop the Plymouth automobile because, in his own words, he did not have enough information to do so at the time. (Tr. 10-15).

Sgt. Donald L. Shaw and Officer Osborne Williams were in Scout Car No. 71 within three (3) blocks of the Dumbarton Pharmacy when they monitored the radio broadcast. They responded to the scene within two (2) minutes by coming onto Dumbarton Street going in an easterly direction shortly after Officer Johnson's vehicle had arrived there. (Tr. 47-48). By this time Officer Johnson had ascertained the license number of the Plymouth. (Tr. 26-31). He pointed the car out to Sgt. Shaw and gave him the license number. Sgt. Shaw instructed Sgt. Johnson to check out whether or not a burglary had occurred while he, Sgt. Shaw, followed the Plymouth containing the four Negro males. (Tr. 39).

Officer Shaw's testimony differs from Officer Johnson's at this point, in that he recalls that there were

three to four, probably four, cars in the 3100 block of Dumbarton Street at the time, including the Plymouth in question. (Tr. 5657). He did not look into any of the other cars to see who was in them. (Tr. 58, 61). Sgt. Shaw's explanation for this was that the area was frequented by white homosexuals and that "four Negro males would stand out." (Tr. 58). Instead, he pursued the Plymouth automobile which drove for several blocks at a safe rate of speed. (Tr. 50).

While Officer Shaw and his partner followed the Plymouth, Sgt. Johnson went to the Dumbarton Pharmacy and discovered that the door had been forced and the lock broken away from the frame. (Tr. 9). He then entered the store, found no one present and returned to his patrol wagon, thereafter, he radioed to the dispatcher "Tell Wagon 71 there probably is a good burglary". (Tr. 24). Sgt. Shaw in Scout 71 replied to the dispatcher, "Scout 71 copied, we're behind a Plymouth, Maryland Tags: EB 1739, East on N Street, just crossing 28th, four Negro males." (Tr. 25).

According to Sgt. Shaw, the confirmation of the burglary was broadcast to him shortly after the Plymouth holding the four Negro males had passed a stop sign at 29th & N Streets. He then radioed his intention to stop the car in the 3200 block of Dumbarton Street. (Tr. 38). Before making the stop, however, the Plymouth turned right on

Dumbarton Street into a dead-end. (Tr. 39). Sgt. Shaw admitted that his intentions were to stop the Plymouth once the burglary was confirmed. (Tr. 50). He intended to do this because he suspected them and wanted to see what was in the car. (Tr. 53). Apparently, the stop sign violation was not a deciding factor in the decision to stop the automobile. (Tr. 63).

Although Sgt. Shaw did not have to force the Plymouth over or signal it to stop because of the dead-end street, once it did come to a halt, he and his partner, Officer Williams, pulled in behind the Plymouth, blocking it, and approached it on foot. At the same time another police car arrived and its two officers helped surround the Plymouth which was stopped. (Tr. 72-73). Officer Shaw asked the driver, Tarrance Johnson, to get out of the car. He stated unequivocally that at that point the other three men in the car were not free to go because he had "strong probable cause that these people had committed the - a crime".

Officer Shaw gave the following responses:

"Q. In effect they were going to be detained. Is that correct?

"A. Yes, after confirmation of the break-in, yes.

"Q. Nothing else mattered, you were going to stop the four people until something -

"A. That is correct.

"Q. More information was obtained?

"A. Right, even if they hadn't violated the stop sign." (Tr. 67-68).

Officer Shaw testified that upon his approach to the car, Tarrance Johnson, the driver, got out of the car. (Tr. 39). After asking Tarrance Johnson for his permit and registration, and advising him that he had passed a stop sign at 29th & N Streets, Officer Shaw testified that he looked into the vehicle. (Tr. 68). At that point, Officer Shaw testified that he saw a coin tray from a cash register partially resting upon the hump in the floorboard of the back seat of the car. (Tr. 83). Upon seeing this, he ordered the rest of the individuals out of the car. (Tr. 68-69). In response to a leading question, duly objected to, he stated that this was when he placed the individuals under formal arrest. (Tr. 69). There was no testimony that Sgt. Shaw had been informed that a coin tray had been taken during the burglary in question.

Thereafter, Officer Shaw testified that he entered the back door of the car from the left side and picked up the coin tray, which was partially covered by a coat. (Tr. 76). He testified further that the tray contained coins. (Tr. 76). He then lifted up the coat and discovered a

plastic bag which contained various objects such as watches, soap, etc., allegedly taken from the Dumbarton Pharmacy. (Tr. 76-77). The bag was hidden by the coat and entirely on the right rear floor. (Tr. 77). There were no other loose objects in the back seat of the car. (Tr. 77). After Officer Shaw went into the car and "unveiled" the plastic bag the police searched all four of the occupants. (Tr. 81).

Although both officers testified that it was raining fairly hard during the time the burglary was allegedly in progress, Officer Shaw could not recall whether or not the coin tray was wet. (Tr. 81). He did admit, however, that the coin tray would have been wet if it was in the open while the burglars made their getaway from the store. (Tr. 82).

Under further cross-examination, Sgt. Shaw testified that when he seized the plastic bag it was not zippered closed. (Tr. 77). He admitted, however, that the coin tray fit inside the zippered bag and the bag could be zippered up with the tray inside. (Tr. 78).

In contrast to this testimony, Sgt. Shaw's companion and junior officer, Osborne Williams, testified that he stood near the rear of the Plymouth on the driver's

side while Sgt. Shaw spoke with Tarrance Johnson. He aided in the search of Tarrance Johnson but did not remember seeing the plastic bag or the coin tray until they were brought to the precinct. (Tr. 96-97). He could not recall whether the coin tray contained coins or was wet when he saw it first. He also could not corroborate Shaw's statement that the tray was outside of the zippered plastic bag. (Tr. 97).

Sgt. Johnson testified that he arrived at the scene of the arrest "approximately five minutes" after observing the premises at the pharmacy. (Tr. 9). At that time, Sgt. Shaw had the four defendants out of the car and under arrest (Tr. 10), but had not searched the car or seized anything therein.

The significant part of Sgt. Johnson's testimony came on cross-examination:

"Q. Do you recall from where the objects were taken?

"A. They were taken mainly from the right rear floor board area.

"Q. Do you realize who saw the objects first or whether any comments were made by any of the officers?

"A. Yes.

"Q. Will you say to Your Honor what happened?

"A. Officer Shaw related that he had seen the objects on the floor.

"Q. What words did Officer Shaw use?

"A. He saw the cash register and merchandise. (Emphasis supplied)

"Q. Did he have a flashlight at the time?

"A. Yes Ma'am.

"Q. Had he shown the flashlight in the car?

"A. I don't know. I wasn't there then.

"Q. You said earlier that you saw him take the package out of the car.

"A. Yes Ma'am.

"Q. You heard him state words to the effect, 'there it is', or 'I see it on the floor', or something?

"Mr. Aldock: I don't think that is his testimony, Your Honor.

"The Court: Would you ask him in the form of a question rather to state what it is

"By Mrs. Chalker:

"Q. Officer could you describe in detail, including conversations and actions of the police officers, what occurred from the time you came on the scene after the car had been stopped?

"A. Officer Shaw and his partner had four subjects out of the car, leaning up against the car.

"At the time I arrived he had not removed anything from the car that I could see.

"When I arrived there, then the subjects were searched. They remained there.

"He told me there was merchandise and a cash register lying in the car. (Emphasis supplied).

"Q. He told you that he had already seen the Merchandise? (Emphasis supplied).

"A. Right. (Emphasis supplied).

"Q. And he was carrying a flashlight?

"A. Right.

"Q. The flashlight was lit?

"A. Not while he was searching the subjects.

"Q. Did there come a time when the flashlight was turned on?

"A. Yes Ma'am.

"Q. And after he turned it on, what did he do?

"A. He was searching the car for more evidence."

(Tr. 20-21)

The final witness was Wallace Threadgill, one of the four occupants of the car and a co-defendant in this case. Threadgill stated that the zippered bag was on the

right rear floor board of the car and covered completely by his coat (Tr. 99). He further testified that the bag contained the coin tray and that the bag was zippered shut (Tr.98-99). He stated that he had held the bag open while Tarrance Johnson placed the coin tray in it (Tr. 99). At the close of the testimony, at the Motion to Suppress, defense counsel argued to the Court there were two theories upon which the evidence should be suppressed: (1) the arrest occurred at the point in time when Officer Shaw and Officer Williams blocked the defendant's auto in the dead-end street and approached the car. With the point of arrest established at this time, the police were not acting upon information which was sufficient to supply probable cause for search or an arrest; (2) even if the point of arrest was established at the time when all four defendants were searched outside of the car, Officer Shaw's statement that he saw a change tray inside of the car was not corroborated by any other evidence and in fact was directly controverted and could not be accorded credibility sufficient to supply probable cause for the arrest at this time. The Court denied the Motion. (Tr. 129).

THE TRIAL

Following the Motion to Suppress the three defendants waived the right to a trial by jury and elected to be tried by the Court. (Tr. 115-116). In addition, counsel stipulated the testimony of the Government wit-

nesses at the Motion to Suppress for use at the trial by the Court. (Tr. 115). This included testimony of Harold F. Johnson of the Metropolitan Police Department who confirmed forced entry into the pharmacy as well as the defendants' presence in the automobile near the pharmacy shortly after the burglary was reported. Donald L. Shaw of the Metropolitan Police Department's testimony included a statement that the defendants were arrested within several blocks of the scene and that their automobile contained many articles allegedly stolen from the store. At the trial the Government called Harold Sugar, Vice President and Secretary of the Dumbarton Pharmacy. (Tr. 117). Mr. Sugar testified that he left the premises at the Pharmacy between 7:30 and 7:45 P.M. on August 9, 1969 and that the premises were secured and locked at the time. (Tr. 118). He also testified that he returned to the Pharmacy at 1:30 A.M. on August 10, 1969 and observed that the door had been broken and the door jam had been torn off of the wall. He further stated that the change tray from one of the drawers of the cash register was missing. In addition, he stated that items from a couple of showcases along with a large plastic film bag were missing. (Tr. 118). He stated that $95.00 and some change was missing from the store. (Tr. 119).

Mr. Sugar testified that no one was given permission to enter the Dumbarton Pharmacy after closing on August 9, 1969. He then identified the plastic bag and its contents as having been taken from the store. (Tr. 119-120). Mr. Sugar further identified the change tray and the approximate amount of money recovered from the defendants. (Tr. 121).

The last Government witness was Helen Frances Schafer who lived across the street from the Dumbarton Pharmacy on the date of the burglary. She testified that some time after midnight on August 10, 1969 during a "terrific rainstorm" she saw four Negro males force open the front door of the Dumbarton Pharmacy. (Tr. 122-123). After reporting the matter to the police, she observed the four men, two carrying a bag each come out of the store and run west on Dumbarton Street. (Tr. 124).

On cross-examination, Mrs. Schafer stated that she was unable to identify any of the men. (Tr. 125). She further stated that aside from the aforementioned bags, she did not see any of the four carrying any other item. (Tr. 126).

Over timely objection the Government then offered into evidence the physical evidence seized from the automobile of the defendants and Tarrance Johnson. (Tr. 127). The Government rested.

The defense then made a motion for judgment of acquittal at the end of the Government's case based on the use of illegally obtained evidence as to both counts. In addition, the motion for judgment of acquittal was made for the grand larceny charge on the basis that the Government had not proved the value of the stolen goods to be $100.00 or more. (Tr. 128). In response to the latter motion, the Court found that since some of the items taken from the Pharmacy had price tags on them because the items were in evidence, the price tags could be used to show value. (Tr. 128-129). The Court therefore found that in addition to the $88.10 recovered from the one defendant, the price tags on two clocks showed sufficient value to come up to $100.00 required by the statute. Defense counsel objected because there had been no testimony laying any foundation for such an assumption. (Tr. 129). The motion was denied. (Tr. 129).

The Court then found all three defendants guilty of grand larceny and burglary in the second degree.

Upon a showing that Cleophus Johnson was probably a narcotic addict, the Court sent Mr. Johnson to the Federal Bureau of Prisons installation at Danbury, Connecticut for report as to whether or not he could be treated under the provisions of Title II of the Narcotics Rehabilitation Act.

(R. 22). After sixty days the Bureau of Prisons reported that although Mr. Johnson was a narcotic addict, he could not be successfully treated at that installation. (Tr. 132). Thereafter, the Court sentenced Johnson to serve twenty months to five years on each count of the indictment, the sentences to run concurrently. (Tr. 137-38).

ISSUES PRESENTED*

1. Whether uncontroverted testimony revealing that the police believe they had probable cause to arrest the defendant coupled with objective facts showing that two police cars blocked the defendants' car in a dead-end street and four policemen alighted from these cars and surrounded the defendants' car and that during that time the defendants were not free to go plus the fact that the police admitted in court that they had used a sham arrest technique establishes that an arrest occurred?

2. Whether a general description as to sex and race and the number of persons involved in the crime is information amounting to probable cause to arrest when the police utilized this information to arrest the first four persons corresponding to that description found in the area even though those persons were riding in a car and there was no information concerning the fact that the suspects

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* This is an original appeal, Rule 17(c)(2)(III) of this Court.

were in a car and no furtive conduct on the part of the occupants of the car?

3. Whether the testimony of one police officer that he saw a coin tray in "plain view" is believable when uncorroborated by any of the five other policemen on the scene with him at the time, when directly contradicted by one of the defendants, when that officer's testimony is otherwise contradicted by his fellow officers, and when the officer's testimony is not consistent with human belief and experience?

4. Whether the Government met its burden of proof beyond a reasonable doubt of value of goods stolen when the only evidence it offered as to value was certain markings on merchandise which was not established to be the value of the merchandise by any testimony?

STATUTORY PROVISIONS

§22-2201. Grand larceny

"Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years."

§22-2202. Petit larceny - Order of restitution

"Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound

discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered."

§22-1801. Burglary - Penalties

"(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years."

SUMMARY OF ARGUMENT

The appellant makes two main arguments in this appeal. The first main contention is based on the theory that the arrest and incidental search and seizure of the appellant's automobile was in violation of the Fourth Amendment. Appellant attacks the validity of the search and seizure on several grounds. Basically he contends that he and the other occupants of the car were under arrest when they were blocked into the dead-end street by two police cars and their car surrounded by four police officers. He makes this argument based upon the testimony of the police that

they had "strong probable cause" to arrest at the time the stop was made. In addition, this argument is buttressed by the admitted use of a sham arrest technique by the officers at this point. Once the point of arrest is established at this time, appellant's argument shifts to the amount of information which the police had at this point. It is uncontroverted that the police were operating on a general description of four Negro males who allegedly burglarized a pharmacy in the general area. The police further knew that the four defendants were in a car on a street in front of the burglarized establishment. They did not know, however, that the burglars were in a car or have any other description of the four alleged burglars. On this information, plus the confirmation of the burglary by another policeman, an arrest was effected.

In the alternative, the appellant argues that should the point of arrest be set at a later point in time, i.e., after Sgt. Shaw looked into the appellant's car and allegedly saw a coin tray in "plain view", the court should reject Sgt. Shaw's statement concerning his observations under the "inherently incredible doctrine". The doctrine should be invoked in this case because of the fact that although five other officers were present at the scene, none of them corroborated the fact that the coin tray was "in

plain view". In addition, Sgt. Shaw's testimony has been impeached by his fellow officers in other respects. Furthermore, his testimony is directly contradicted by the statement of one of the defendants that the coin tray was in a zippered bag which was shut and covered by a coat placed on the rear right floorboard of the car. Taken together these factors plus the fact that human experience and knowledge is directly contradictory to Sgt. Shaw's alleged observations call for the invocation of the "inherently incredible doctrine". If this doctrine is applied to this testimony probable cause is absent and the arrest should be declared unlawful.

Finally, appellants argue that the Government failed in its efforts to prove that the goods stolen were worth $100.00. The evidence showed that $88.10 was recovered from one of the defendants. The store manager testified that approximately $95.00 in cash was stolen. There was no other testimony as to the value of any goods taken from the store. Although several items were identified as having been recovered there was no testimony as to their value and no foundation laid to show that the price tags on these items was indicative of value. Nevertheless, the court recognized these price tags in totaling up the value of the goods in order to make the amount in question over $100.00. This was done over strenuous objection and is in direct conflict with recent cases in this court concerning proof of amount of value in grand larceny cases.

ARGUMENT

I. A WARRANTLESS ARREST BASED UPON A GENERAL DESCRIPTION OF SEX AND RACE PLUS PROXIMITY TO THE SCENE OF THE CRIME WITHOUT FURTHER CORROBORATING INFORMATION IS AN INVESTIGATIVE ARREST WITHOUT PROBABLE CAUSE AND THEREFORE IN VIOLATION OF THE FOURTH AMENDMENT.

There are two separate issues presented for review of the denial of the Motion to Suppress by the trial court: (1) the time of the arrest; (2) whether probable cause existed at that time. Appellee contends that the search and seizure under scrutiny were incidental to the arrest of the defendants. Therefore the legality of that arrest is the main factor to be tested on appeal. Henry v. United States, 361 U.S. 98 (1959).

The trial judge made no finding of fact as to when the arrest occurred. Nevertheless, that issue must be resolved before the legality of the arrest is determined, because ". . .an arrest is not justified by what the subsequent search discloses." Henry v. United States, 361 U.S. 98, 104 (1959). 1/

A. WHEN THE INTENT OF THE POLICE AND THEIR ACTIONS SHOW THAT THEY INTENDED TO STOP, SEARCH AND INTERROGATE OCCUPANTS OF A CAR UNDER SUSPICION FOR BURGLARY THE OCCUPANTS ARE UNDER ARREST WHEN THEIR CAR IS BLOCKED AND SURROUNDED BY ARMED POLICE OFFICERS.

The facts adduced at the Motion to Suppress show that the arrest occurred when Sgt. Shaw and Officer Williams

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1/ As the Court said in United States v. Di Re, 332 U.S. 581, 595 (1948) ". . .a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

blocked the defendants' car in the dead-end street and approached it. Although this Circuit follows the rule that all police stops of automobiles are not necessarily arrests, it has not abandoned the rule of Henry v. United States, 361 U.S. 98, 103 (1959) that under certain circumstances the interruption and restriction of a person's liberty of movement while in an automobile might constitute an arrest. Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967).

As Judge Leventhal stated in Bailey Id. at 364, 389 F. 2d at 315 (concurring opinion) the key question is "whether the constraints applied were protective of the police and bystanders, or were custodial". To determine this the Court has looked at the intent of the officer, [2] the subjective feeling of the persons detained [3] and the objective facts surrounding the stop. [4]

In applying that test to the case at bar Sgt. Shaw's intentions deserve close analysis. Shaw testified that when he blocked the car into the dead-end street and got out to approach it none of its occupants were free to go, ". . .because I--we had, I will say, strong probable cause that these people had committed the--a crime." (Tr. 67). He stated that after confirmation of the break-in he intended to detain all four suspects. (Tr. 67). He further stated

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2/ Young v. United States, 435 F.2d 405 (D.C. Cir. 1970).
3/ Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 555 (1961).
4/ Seals v. United States, 117 U.S. App. D.C. 79, 325 F.2d 1006, cert. denied 376 U.S. 964 (1963).

that he intended to stop the car because he suspected its occupants of the burglary and wanted to see what was inside of the car. (Tr. 53). In addition, Sgt. Shaw testified that he used the pretext of the passed stop sign to justify his stop to the driver and to look into the car. (Tr. 50-51). Under oath, however, he admitted that the stop sign violation did not cause him to stop the automobile and interrogate the driver. (Tr. 67-68).

These facts make out a clear case of intent on the part of Sgt. Shaw to stop, detain and search the automobile and its occupants as soon as the break-in was confirmed. In addition we have the added factor of the use of an alleged traffic violation to justify these actions. Such "sham arrest" tactics have been rejected and criticized by this Court in the past. See Hill v. United States, 135 U.S. App. D.C. 233, 418 F.2d 449 (1968). As Judge Bazelon stated in United States v. Johnson, ____F.2d ____ (D.C. Cir. No. 23,900) (March 22, 1971) slip op. 13, the "sham arrest" cases do not allow an officer to stop a car for a traffic violation ". . .in the hopes of turning up evidence of another crime in the course of a thorough frisk for weapons or in the course of any other search permitted by law." Id.

Sgt. Shaw's testimony that he had "strong probable cause" at the time of the stop belies any inten-

tion other than to make an arrest. His entire testimony clearly reflects that he followed the defendants' car with the intention of making an arrest as soon as he was informed that the break-in was confirmed.

There is no direct evidence concerning the second criteria to be considered--the subjective feeling of the defendants. However, the Court may consider the objective facts to determine this aspect of the question. See Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 555 (1961). Here the objective facts show that two police cars, with four officers, were on the scene by the time Sgt. Shaw approached the defendants' car. The Shaw cruiser had its light on and the officers surrounded the car, while blocking it in a dead-end street. There was no testimony that any of the officers felt endangered or that there was any reason to believe the occupants of the car were armed. It was late at night, during a rainstorm and no one else was around. Hence the "rush hour" and "dangerousness" aspects of Bailey, supra, are absent.

In addition a police van with two more officers arrived on the scene shortly after the stop. None of the occupants of the car were free to go from the moment of the stop. Taken together these factors show that Sgt. Shaw suspected the occupants of the car of the break-in and that he felt he had enough information to arrest them once the

break-in was confirmed. His actions thereafter are perfectly consistent with the theory that they were under arrest at the time of the stop. The injection of the alleged stop sign violation into the equation introduced an element of "sham" which must be considered as well.

In Henry v. United States, 361 U.S. 98 (1959) the police suspected the defendants of theft of whiskey from an interstate shipment. They followed their car for sometime and observed the defendants carrying certain cartons from a building and placing them in their car. When the police pulled the defendants' car over the Court found that an arrest had occurred stating:

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case was complete. Id. at 103.

As this Court pointed out in Seals v. United States, 117 U.S. App. D.C. 79, 325 F.2d 1006 (1963) an arrest may often occur ". . .even though no actual force or visible physical restraint was used, or any formal declaration of arrest made." Id. at 81, 325 F. 2d at 1008. (footnote omitted.)

B. GENERAL KNOWLEDGE OF SEX AND RACE OF THE BURGLARS DID NOT GIVE POLICE PROBABLE CAUSE TO ARREST THE FIRST PERSONS IN THE AREA MATCHING THAT DESCRIPTION.

We turn from the point of arrest to the justification for an arrest. At the time of the stop Sgt. Shaw knew

that a break-in had occurred at the Dumbarton Pharmacy. He had information, which was not then known to be reliable, that four Negro males had perpetrated the crime. He had no description as to height, weight, age or dress of the four men. He did not know whether they were on foot or in a car. He did not know if anything had been stolen from the pharmacy. In short, he had only the most general type of description. In addition he knew that four Negro males were in a car on the same street as the burglary shortly after it occurred. However, he did not observe them do anything consistent with flight. Their car was proceeding slowly. It pulled over to allow a police van by. The driver took no furtive or evasive actions. Officer Shaw did not know who was in the other three cars that were near the pharmacy when he arrived. He did, however, think it strange that four Negro males would be in an area of Georgetown frequented by homosexuals.

It is submitted that the officer did not have "probable cause" to arrest at this time. As the Henry Court explained:

> "Evidence required to establish guilt is not necessary. . .On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed [and that the suspects committed the offense]." 361 U.S. at 98.

In a warrantless arrest situation the burden of proof is upon the government to show that the arresting officer had information constituting probable cause for arrest prior to the arrest. Rouse v. United States, 123 U.S.App. D.C. 348, 359 F.2d 1014 (1966). It is submitted that the government has not carried that burden in the case at bar. The arrest here was made on the basis of a general description of sex and race of four persons. The fact that four Negro males happened to be in Georgetown at night might have been significant to Sgt. Shaw but is not the type of information that a reasonable and prudent police officer relies upon in exercising the awesome power to arrest without a warrant. See Beck v. Ohio, 379 U.S. 89 (1964). As Judge Leventhal noted in Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 307, 312 "[P]robable cause may be a plastic concept but not for pressing into any and all molds."

Gatlin v. United States, 117 U.S.App.D.C. 123, 326 F.2d 666 (1963) is a case very much in point. In Gatlin, police were investigating a robbery in which one of the participants was a Negro male wearing a trenchcoat. Police suspected a man who had taken a cab to a wooded area a mile or so from the scene shortly after the crime. After searching the area they found Gatlin near the woods. He fit the general description given and was arrested. The Court held that the police lacked probable cause on the basis of the

general description. The Motion to Suppress was granted because:

> "It was an arrest for investigation. The only evidence on which the arrest was predicated was the fact that there was a robbery, that one of the robbers was a Negro wearing a trenchcoat that a Negro man fled from a taxi, and that Gatlin, a Negro man, was observed walking down the street a mile and a half from the robbery wearing a trenchcoat. Id. at 127-28, 326 F.2d 670-71.

Here, unlike many search and seizure cases, the police knew that a crime had been committed but they had only the most general information concerning the culprits. To allow police to arrest the first four Negro males they saw in the area on the basis of such information would be to ignore the Fourth Amendment's injunction against "unreasonable searches and seizures". See Davis v. Mississippi, 394 U.S. 721 (1969).

The arresting officers had no information that the occupants of the automobile had been inside of the pharmacy. They had no information that the burglars were in an automobile, much less a description of an automobile. They had no information concerning the age, height, weight, clothing or appearance of any of the four who had been inside of the pharmacy. Subsequent to spotting the four inside of their automobile there was no furtive activity on their part which might have heightened the officer's suspicion. In short, Sgt. Shaw arrested the first four Negro males he saw

in Georgetown after the break-in. He did not even bother to look into the other cars he saw on the street in front of the pharmacy. He narrowed his focus as soon as he spoke with Sgt. Johnson and followed a single-minded path from then on. To hold that such activity is within the bounds of the Fourth Amendment is to ignore the evils the amendment sought to erradicate.

Although probable cause is not subject to any one quantitative definition, this Court recently observed that knowledge of incriminating facts amounting to strong suspicion does not constitute probable cause for arrest. United States v. Harris, 434 F.2d 74 (D.C. Cir. 1970). In Harris police knew that the armed robbers of the Merkle Press escaped in a maroon Chevy II Nova bearing license plates registered to a Ford automobile owned by William Harris. A Thomas Harris owned a maroon Chevy II Nova. A car answering the description of the getaway car, with exhaust and engine still warm, bearing no license plates and with the bolts for the license plates lying on the ground under the rear bumper was parked near Thomas Harris' address. A person named Harris worked for Merkle Press. The Court held that police did not have knowledge amounting to probable cause to arrest Thomas Harris at the time this information became known to them.

Here the police knew some crime had been committed and that an unknown informant stated that four Negro males committed it. Without further description or further investigation the police used a ploy of a traffic arrest to stop the first four Negro males they saw near the scene. 5/ It is submitted that the total lack of description and absence of furtive conduct on the defendants' part coupled with the "sham" nature of the stop conclusively leads to the fact that the police made an investigatory arrest. As this Court noted sixteen years ago such arrests are "a matter of vast public importance, and. . .[have] been of such importance since Colonial days". Wrightson v. United States, 95 U.S.App.D.C. 390,392, 222 F.2d 556, 558 (1955).

Here the police did not wait until sufficient information was available 6/ but forced the situation by the ruse of a sham arrest. See Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961).

To hold that a police officer is legally entitled to arrest the first four Negro males he sees near the scene

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5/ This then is unlike the case of a legitimate traffic stop in which suspicion heightens into probable cause even though the officer has no specific knowledge that a crime has been committed. Compare Bell v. United States, 102 U.S.App.D.C. 383, 254 F.2d 82, cert. denied, 358 U.S. 885 (1958) with Hill v. United States, 135 U.S.App.D.C. 233, 418 F.2d 449 (1968).

6/ See Mills v. United States, 90 U.S.App.D.C. 365, 196 F.2d 600 (1952) cert. denied, 344 U.S. 826 (1953). (Five day observation of numbers runner and car.)

of a break-in without even bothering to check out other automobiles in the area and without observing any furtive activity on their part when the arrest is based upon the most general type description is to ignore the rule that the police must have information which "a reasonable and prudent peace officer" would feel justified an arrest. See Bell v. United States, 102 U.S.App.D.C. 383, 387, 254 F.2d 82, 86, cert. denied, 351 U.S. 885 (1958).

II. WHERE THE TESTIMONY OF ONE POLICEMAN OF SIX PRESENT IS NOT CORROBORATED BY THE OTHER OFFICERS AND IS CONTRADICTED BY THE DEFENDANT AND THE OFFICER'S STORY IS NOT CONSISTENT WITH COMMON KNOWLEDGE HIS TESTIMONY SHOULD BE REJECTED.

Should the Court fix the time of arrest at the moment when Sgt. Shaw ordered all of the occupants out of the car for a personal search there is likewise ample authority to rule that the arrest and ensuing search were illegal. This alternative argument is based upon two theories.

First, even if the Court should choose to credit Sgt. Shaw's testimony that he saw part of a coin tray protruding over the hump in the rear floorboard of the car, that observation would not be sufficient to provide him with probable cause for arrest since he had no knowledge that a coin tray had been stolen.

More importantly, however, there is a strong argument against crediting Sgt. Shaw's testimony concerning

his alleged observation of the coin tray on the floorboard of the rear seat, at night, during a rainstorm while two people sat in the back seat of the automobile.

It is respectfully submitted that this testimony can be rejected by the Court as being inherently incredible and not worthy of belief. Jackson v. United States, 122 U.S. App.D.C. 324, 353 F.2d 862 (1965). In assessing the credibility of a police officer under similar circumstances the Jackson court admitted that it was in no position to observe the demeanor of the witness. However, the Court found:

> "A number of other factors often considered in judging credibility must be examined, such as whether the witness was interested in the outcome, his reputation, his degree of recall, the internal inconsistencies in his testimony, and the likelihood of his story. Id. at 328, 353 F.2d at 866. (footnote omitted).

In addition inconsistencies between statements of different policemen have been found to be significant in finding police testimony inherently incredible. Rouse v. United States, 123 U.S.App.D.C. 348, 359 F.2d 1014 (1966).

In the case at bar the Court is confronted with several factors which indicate that the credibility of Sgt. Shaw is suspect. Turning to the factors outlined in Jackson first, consider the following: (1) Sgt. Shaw's interest in the outcome is that of any arresting officer who is faced with the charge of illegal conduct, he certainly had an interest in seeing his actions vindicated and

his case closed successfully; (2) there is no negative evidence concerning Sgt. Shaw's reputation; (3) Sgt. Shaw's degree of recall appears to have been fairly good, although he was unable to recall some crucial things (Tr. 56, 81); he stated that his memory was better at the hearing on the motion than before the grand jury (Tr. 57) and he seemed confused about the source of light available to see inside of the car (Tr. 74); his testimony did not contain many internal inconsistencies, however, when challenged on several occasions he became defensive or changed the emphasis of his testimony (Tr. 58-61). The likelihood of his testimony presents a somewhat different picture.

Sgt. Shaw's theory of the arrest depends entirely upon the sighting of the coin tray inside of the car prior to ordering anyone out of the car. It stretches credulity to believe that after the occupants of the car had carefully hidden the fruits of the crime inside of a plastic bag, covered it with a coat, placed it on the rear floorboard, hidden it by one of the occupants feet and legs that they would then place a coin tray on the hump of the rear floorboard in "plain view" of the police.

This is especially true when we consider other relevant factors which are considered when testing credibility. The burglary occurred during a rainstorm. The burglars

put all the stolen articles into a bag. 7/ Yet in order for Sgt. Shaw's testimony to be consistent it is almost necessary to believe that one of the burglars carried the coin tray separately during the escape. In view of the fact that the burglars ran away from the store (Tr. 124) it is hard to see how anyone could run while carrying a tray full of coins. In addition to this being highly impractical the only witness who watched the escape saw nothing to indicate any such conduct. (Tr. 122-27).

In addition the testimony of Officer Williams must be considered. Officer Williams marked all of the evidence with Sgt. Shaw's initials (Tr. 42-44) yet he was unable to recall seeing the coin tray loose in the car. (Tr. 96). Moreover, Williams unequivocally disagreed with Shaw's statement that the driver, Tarrance Johnson, got out of the car before Shaw got to it. (Tr. 88, 91). Along with this testimony must be considered the physical fact that the coin tray in question fit inside of the zipper bag with all of the other merchandise. (Tr. 78).

Add to this the testimony of Sgt. Johnson who testified that he reached the scene of the arrest prior to Sgt. Shaw's search inside of the car. (Tr. 19). Sgt. Johnson stated that Sgt. Shaw told him that he had seen both a cash register and merchandise inside of the car at

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7/ Mrs. Schaeffer testified as to two bags - only one was found.

that point. (Tr. 21). Sgt. Johnson said nothing about the change drawer being outside of the bag. Indeed it seems entirely logical to infer from his testimony that they all were discovered at the same time, i.e., after Sgt. Shaw ordered the occupants out of the car. It should be reiterated that the government bears the burden of justifying a warrantless arrest and search. Moreover, in claiming the doctrine of inherent incredibility the appellant does not need to bring positive proof before the Court. Jackson v. United States, 122 U.S.App.D.C. 324, 329, 353 F.2d 862, 867 (1965). Rather

> "It is enough to invoke the doctrine if the person whose testimony is under scrutiny made allegations which seem highly questionable in the light of common experience and knowledge, or behaved in a manner strongly at variance with the way in which we would normally expect a similarly situated person to behave. Id.

Had Sgt. Shaw spyed the coin tray as he claims why did he order all of the defendants out of the car without mentioning it to any of his fellow officers or inquiring of the occupants of the car the origin of the tray? It seems clear that he made no statement to anyone until after he had gone inside the car and taken the coat off the plastic bag. Moreover, nowhere did he testify that he saw the coat or the bag until after all of the occupants were outside of the car.

Lastly we must consider the testimony of Wallace Threadgill, one of the defendants below, who stated that he held the plastic bag open while another of his group placed the coin tray inside. (Tr. 99). He testified further that the bag was zippered shut, placed in the rear floor and covered with his coat. (Tr. 99-100). In evaluating his testimony it should be noted that time and again cases come before this and other courts in which the police testify that they stopped a car and spotted some incriminating object inside the car without making a "search". This often heard testimony has resulted in a doctrine aptly named the "plain-view doctrine" which approves of arrests based on probable cause gained through a "plain view" while noting that an actual search of the car to turn up the evidence in the first instance would have been illegal. In dealing with a similar phenomen generated by the judicial enforcement of the Fourth Amendment a New York court recently commented on the amazing number of arrests made based on "dropsy" testimony, i.e., testimony that the defendant dropped his narcotics when the police approached. People v. McMurty, 314 N.Y.S.2d 194 (Sup. Ct. 1970). The New York Court held that such testimony should always be "scrutinized with especial caution". Id. at 197. In addition the court held that when the police testimony is contradicted

by the defendant and the defendant's story is credited by the "slightest independent" corroboration or the officer's testimony impeached by the "slightest independent contradiction" the motion to suppress will be granted. Id. at 198.

It is submitted that such a rule should be enjoined upon motions to suppress in the District of Columbia. This Court has taken notice of questionable police testimony which might be designed to skirt the protection of the Constitution in the past. In Veney v. United States, 120 U.S.App.D.C. 157, 344 F.2d 542 (1965) Judge Wright took a dim view of the tired practice of "spontaneous apologies" rendered by defendants to their victims in the presence of the police. He suggested that ". . .the time is ripe for some soul searching in the prosecutor's office before it offers anymore 'spontaneous' apologies in evidence." Id. at 158, 344 F.2d at 543. (concurring opinion).

In the case at bar at least six officers were on the scene prior to the evidence being taken from the car. Only one of those officers stated that the coin tray was not inside the zippered bag underneath the coat. That officer's statement is directly contradicted by one of the occupants of the car. The officer's testimony is further

impeached by test of common knowledge and experience. In addition other parts of his testimony have been directly contradicted by his brother officers. On the other hand, the defendant Threadgill's testimony is corroborated by human experience and common knowledge. In addition there is the fact of the officer's memory failure concerning whether the coin tray was wet and whether any coins were inside of the bag or on the floor of the car. When one considers the convenience of the "plain view" doctrine to a policeman attempting to justify an arrest it seems appropriate to apply this Court's rule in Jackson v. United States, 122 U.S.App.D.C. 324, 353 F.2d 862 (1965) and Rouse v. United States, 123 U.S.App.D.C. 348, 359 F.2d 1014 (1966).

III. WHERE THE GOVERNMENT OFFERS NO TESTIMONY AS TO THE VALUE OF GOODS STOLEN AND THE AMOUNT OF MONEY STOLEN ALONG WITH THE GOODS IS LESS THAN $100.00 A MOTION FOR JUDGMENT OF ACQUITTAL MUST BE GRANTED ON A CHARGE OF GRAND LARCENY.

The government's entire case relating to identification of goods stolen from the Dumbarton Pharmacy was based upon the testimony of Harold Sugar, Vice President and Secretary of the corporation. (Tr. 117). Mr. Sugar testified that cash in an amount estimated at $95.00 was stolen and that certain items including clocks, soap and a plastic film bag were also taken. Nowhere in his testimony did Mr. Sugar itemize the goods taken or place any

value on these goods. (Tr. 117-122). Police testimony revealed that $88.10 was recovered from Tarrance Johnson. (Tr. 45). There was no other testimony concerning the value of the goods taken from the pharmacy.

At the close of the government's case counsel for the appellant made a motion for judgment of acquittal on the grand larceny charge in view of the failure of the government to prove that property worth $100.00 had been taken. (Tr. 128). The following colloqy then occurred:

"THE COURT: Mr. Aldock, do you wish to respond to the motion with regard to the grand larceny?

"MR. ALDOCK: While not specifically identified, we are dealing with $12.00 worth of merchandise. "I think the merchandise appearing in court, the Court may notice by volume we have a value far in excess of $12.00.

"THE COURT: I believe the witness Mr. Sugar testified that some of the items have price marks on them. They are now in evidence. "Will you indicate those items that have price marks?

"MR. GROVE: Your Honor, I object to the Court taking notice of any prices without further testimony requesting actual value.

"Anything on any of those items may or may not be an accurate reflection of price and until qualifying testimony I don't think it would be at all proper for the Court to take notice.

"THE COURT: The Court will where the man stated his price marks were on the items.

"MR. ALDOCK: Two clocks I have in my hand. One has a price tag of $16.95 and the other price tag is $8.99. All the clocks have price tags on them also.

"The money amount was about $89.00.

"THE COURT: The Court will overrule the motion as to all three defendants." (Tr. 128-29).

The grand larceny statute in the District of Columbia is very clear. It states:

> "Whoever shall feloniously take and carry away anything of value of the amount or value of $100.00 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years. 22 D.C. Code §2201.

The government clearly has the burden to prove that the value of the goods taken is $100.00 or more. Brock v. United States, 122 A.2d 763 (1956). As this Court pointed out in Ransom v. United States, 119 U.S.App.D.C. 154, 337

F.2d 550 (1964) there must be adequate evidence before the finder of fact to sustain a finding that the goods were worth $100.00 or more. The type of evidence required cannot rest on "conjecture or surmise". United States v. Wilson, 284 F. 2d 407, 408 (4th Cir. 1960). Moreover, the Court is not allowed to take judicial notice of the value of the merchandise displayed before it. 8/ What is called for is direct evidence and not hearsay. Chew v. United States, 112 U.S. App.D.C. 6, 298 F.2d 334 (1962).

More recently in United States v. Thweatt, 433 F.2d 1226 (D.C. Cir. 1970) this Court again came to grips with the proof of value question. There the Court reaffirmed the rule that proof of value in a grand larceny case is as important an element of the government's case in chief as proof of the identity of the thief. In United States v. Henderson, _____ F.2d _____ (USCA No. 23,733, 11/18/70) this Court held that the law requires "rigor in proof of $100.00 value". Id. at p. 4, slip opinion.

Here there was no evidence that the stolen goods were worth anything. The Court took notice of the price tags on two items which were not testified to as being an accurate reflection of the value of the goods. Clearly

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8/ United States v. Wilson, 284 F.2d 407 (1960). See Cooper v. State, 191 So.2d 229 (Ala. Ct. App.), cert. denied, 191 So.2d 229 (Ala. Sup. Ct. 1966) where the court struck down a grand larceny conviction based on proof of a stolen car because its value was not shown. In Wilson, supra, the property involved was 72 rifles stolen from the government.

the Court resorted to "conjecture or surmise" in relying on unqualified markings on the goods in evidence.

It is submitted that under the doctrine of United States v. Henderson, Id., a similar case dealing with concurrent sentences for burglary and grand larceny, the Court should reverse the conviction for grand larceny because it is "beset by substantial doubt".

CONCLUSION

Appellant prays that the Court reverse both judgments of conviction and order the entry of judgments of acquittal. In the alternative appellant prays that if the Court upholds the validity of the arrest, search and seizure complained of herein it vacate the judgment of conviction for grand larceny and remand the case for entry of a judgment of conviction for petit larceny.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was mailed, postage prepaid, this 29th day of April, 1971, to the Assistant United States Attorney, Appellate Division, United States Courthouse, Washington, D.C. 20001.

DANIEL G. GROVE, ESQ.

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,842

UNITED STATES OF AMERICA, APPELLEE

v.

CLEOPHUS JOHNSON, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN D. ALDOCK,
BARRY WM. LEVINE,
Assistant United States Attorneys.

Cr. No. 1780-69

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Where the arresting police officer was legitimately positioned beside the car in which appellant was a passenger and from that vantage point observed a cash register tray exposed in plain view, having previously received a report of a burglary of a drug store just a few blocks away, did he have probable cause to make an arrest?

II. Was the testimony of Sergeant Shaw trustworthy?

III. Did the Government prove that the value of the items stolen by appellant exceeded the statutory requirement for grand larceny?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,842

UNITED STATES OF AMERICA, APPELLEE

v.

CLEOPHUS JOHNSON, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed November 10, 1969, appellant, Leon Blocker, Tarrance Johnson and Wallace Threadgill, Jr., were charged with second-degree burglary (count one) and grand larceny (count two), in violation of 22 D.C. Code §§ 1801 (b) and 2201, respectively. On August 6, 1970, upon waiver of jury trial (Tr. 114-116), appellant, Blocker and Threadgill were tried by the court with the Honorable June L. Green

presiding.[1] Appellant and his co-defendants were found guilty as charged. On December 23, 1970, appellant was sentenced by Judge Green to a term of imprisonment for twenty months to five years on count one and twenty months to five years on count two, to be served concurrently.[2] From that judgment appellant has taken this appeal.

Immediately prior to trial the court heard appellant's motion to suppress evidence (Tr. 4-114). At the hearing in that motion Sergeant Harold F. Johnson of the Metropolitan Police testified that on the rainy night (Tr. 11) of August 9-10, 1969, shortly after midnight, while on duty assigned to patrol wagon No. 7[3] in Georgetown, he monitored a radio run for a burglary in progress at the Dumbarton Pharmacy located at 3146 Dumbarton Avenue, N.W. The radio flash described the suspects inside as four Negro males. Sergeant Johnson immediately proceeded from his position at 31st and P Streets, N.W., approximately two and one-half blocks from the pharmacy (Tr. 7-8, 14-15), directly toward the pharmacy, turning west against the flow of traffic on Dumbarton Avenue, a one-way street running eastward. As he turned, he saw two cars driving toward him. The first car was occupied by a Caucasian man and woman; the second car, observed by Sergeant Johnson at a distance of "six or seven car lengths" (Tr. 13) from the pharmacy, was occupied by four Negro men.

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[1] Tarrance Johnson was treated as a juvenile, and on October 20, 1970, upon oral motion by the Government, the indictment against him was dismissed by Judge Green.

[2] On March 8, 1971, Threadgill appeared before Judge Green for sentencing, but imposition of sentence was suspended, and he was placed on probation for a period of four years. He has not noted an appeal. Blocker has not yet been sentenced.

[3] The patrol wagon in which Sergeant Johnson was seated was operated by another officer of the Metropolitan Police (Tr. 27). However, Sergeant Johnson, not having been assigned there "for quite some time now," did not remember his name at trial (Tr. 10). Sergeant Donald L. Shaw of the Metropolitan Police in his testimony later referred to that person as Officer Rupp (Tr. 36).

Suspecting their possible involvement (Tr. 11-12), he particularly noted their vehicle to be a black Plymouth bearing Maryland tags (front tag missing (Tr. 29)) ED-1739. That portion of the street was very narrow, and the Plymouth had to stop momentarily to permit the patrol wagon to pass (Tr. 7-8, 24, 26-27, 31); it was during the time when it was at rest that Sergeant Johnson recorded the tag number (Tr. 30). Realizing the potential importance of following that car, the patrol wagon driver continued down the block seeking a place to turn around.[4] However, before reaching a suitable place to turn, Sergeant Johnson observed a police scout car operated by Sergeant Donald L. Shaw approaching from the opposite direction. That car was also responding to the radio run. Johnson quickly advised Shaw that the black Plymouth with Maryland tags ED-1739 was occupied by four Negro males and urged him to follow it. Johnson indicated that he would go to the pharmacy in an effort to confirm or negate the report that it had been burglarized. He stated that he would radio his conclusion to Shaw. Sergeant Johnson then went to the pharmacy and there observed "that the door had been forced [and] the lock broken away from the frame" (Tr. 9). Accordingly, he radioed to Shaw confirming that a burglary of the pharmacy in fact had been perpetrated (Tr. 8-9, 32, 34).

Sergeant Shaw and his partner, Officer Osborn Williams, were in their scout car at the intersection of N and Potomac Streets, N.W., when they monitored the radio broadcast referring to the burglary in progress at the Dumbarton Pharmacy. They quickly converged on the

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[4] Sergeant Johnson made no effort to stop the Plymouth. He offered two justifications for declining to do so: first, at that moment there had been no confirmation that a burglary had been committed; second, the occupants of the vehicle could have easily made an escape had they been so inclined. The street was too narrow for the patrol wagon to execute a U-turn, so that it would have been impossible for the wagon to give chase if it became necessary (Tr. 12-13, 18).

scene, where they were met and advised by Sergeant Johnson to follow the 1961 black Plymouth bearing Maryland tags ED-1739 with four Negro male occupants. They were to maintain their surveillance of the car pending confirmation of the burglary report by Sergeant Johnson (Tr. 35-36). Shaw prudently followed[5] the vehicle and saw it fail to stop at the stop sign at the corner of 29th and N Streets. Soon thereafter, while Shaw's car was in the 2800 block of N Street, "the wagon confirmed the break-in [over the radio]" (Tr. 36-38, 48-50). Sergeant Shaw testified that prior to the time that the Plymouth failed to stop at the stop sign he had intended only to follow it. However, after the stop sign violation occurred, he determined that even if the burglary confirmation were not forthcoming, he would stop the car for the traffic violation. Of course, when the burglary confirmation was received, Shaw formulated the intent to stop the car to inquire into that as well[6] (Tr. 50-51, 62-63, 66).

Sergeant Shaw continued to follow the vehicle as it turned left from N Street onto 27th Street and then right from 27th Street onto the final portion of Dumbarton Avenue which culminates in a dead end (Tr. 38-39). It being impossible to proceed any further, the Plymouth voluntarily came to a stop without any signal from the scout car. As Sergeant Shaw alighted from the scout car, the driver of the Plymouth, Tarrance Johnson, alighted also (Tr. 40, 69, 73-75). Sergeant Shaw approached the Plymouth and assumed a position next to the driver's side where Tarrance Johnson stood with the

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[5] Sergeant Shaw testified that the area was frequented by "quite a few" white homosexuals and believed that the presence of four Negro males in that particular area would be very noticeable (Tr. 58).

[6] On cross-examination of Sergeant Shaw by appellant's trial counsel (who also represents him on this appeal) it was determined that upon confirmation of the burglary Sergeant Shaw intended to stop the Plymouth only so that "more information [could be] obtained" (Tr. 67-68).

left front door open (Tr. 39-40, 73-75). Officer Williams stood to the rear of the Plymouth and somewhat to its left (Tr. 71-72, 88, 95-96). Sergeant Shaw advised the driver that he had passed a stop sign at 29th and N Streets and asked him to produce his driver's license and automobile registration. While they were engaged in a discussion about the stop sign, Shaw was able to look inside the vehicle and see in addition to the other three occupants "a change tray [from a cash register] protruding, sort of resting on the hump in the rear seat of the—floor of the car, on the right side" (Tr. 38, 76). Another scout car meanwhile had arrived on the scene[7] (Tr. 67). The headlights of the two scout cars in addition to a street light in the dead end provided ample illumination[8] (Tr. 41, 73-75) for Sergeant Shaw, who "just looking into the vehicle . . . could see . . . [the] tray" (Tr. 41). A portion of the tray and coins therein were seen in plain view protruding from beneath a jacket (Tr. 42, 75-76). After observing the coin tray and "a bulge . . . beneath the jacket" (Tr. 42), Sergeant Shaw ordered the remaining three individuals out of the car (Tr. 40-42, 68-69). Then after all were out of the car (Tr. 80-81), using his flashlight (Tr. 40) Sergeant Shaw lifted the jacket and unveiled a plastic bag containing approximately ten to twelve objects[9] (Tr. 77). It was at that moment that Sergeant Shaw

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[7] That scout car was described as scout car No. 72 (Tr. 67), but the names of the officers assigned to that vehicle do not appear in the record. When that car arrived, confirmation of the burglary had already been broadcast over the police radio. Those officers got out of their car but did not approach the Plymouth. They merely were available to assist Sergeant Shaw in the event he sought aid (Tr. 67, 71-73).

[8] Because the driver's door of the Plymouth remained open, the dome light of the sedan may have provided additional light for Sergeant Shaw (see Tr. 74-75).

[9] Those objects, which were described in part as soaps, clocks and watches and to which price tags were attached, were identified at trial by Harold Sugar, vice president and secretary of Dumbarton Pharmacy, Inc., as belonging to the pharmacy (Tr. 117-121).

declared that the occupants of the car were under arrest [10] (Tr. 84). Then, with the aid of the other officers who were standing nearby (but not alongside the Plymouth) (Tr. 71-73, 92-93, 96), a search of the four suspects was commenced (Tr. 79, 81, 84). In addition to the merchandise and coins found in the car, a large amount of money was found on the person of Tarrance Johnson. The total sum of money recovered amounted to $88.10 (Tr. 42-54).[11]

Officer Osborn Williams, Sergeant Shaw's partner at that time, was a novice in the Metropolitan Police Department (Tr. 86). His recollection of the events of that early morning hour was vague. He did not recall whether Tarrance Johnson was already out of his car when Sergeant Shaw approached him or whether he got out very soon thereafter (Tr. 88, 91, 95-96), nor did he remember the lighting conditions at the time of the incident (Tr. 89). Although Williams remembered seeing the coin tray and the items in the plastic bag later at the precinct, he did not recall whether he saw them at the scene of the arrest (Tr. 93-97). To his best recollection he believed that he did not ever get close enough to the Plymouth to be able to peer inside of it (Tr. 96). He was certain, however, that he participated in the search of Tarrance Johnson which was conducted at the rear of the Plymouth and which yielded a substantial amount of money (Tr. 94, 96).

In support of its suppression motion the defense offerred only the testimony of defendant Wallace Threadgill. He testified that the coin tray was placed in the plastic bag with the other items by Tarrance Johnson

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[10] Sergeant Shaw testified that none of the occupants of the Plymouth were under arrest when the car originally stopped. Indeed, none of them were asked to get out of the car until after Sergeant Shaw observed the cash register coin tray "resting on the rear hump" of the car floor (Tr. 68-69, 76).

[11] It was after the arrest of the four suspects that Sergeant Johnson, who had confirmed the burglary report after investigation at the pharmacy, arrived at the dead end (Tr. 9-10, 21, 69-70).

with his aid. Threadgill then stated that he placed the bag with its contents [12] under the Plymouth's right rear seat and further attempted to conceal it by placing his jacket over it (Tr. 99). From that point Threadgill's testimony corroborated that of Sergeant Shaw. He stated that Tarrance Johnson alighted from the Plymouth when it came to a stop at the dead end (Tr. 100-101). He was uncertain if the car windows were open, but he did hear Shaw ask Tarrance Johnson, both of whom were standing by the Plymouth, for his license and registration (Tr. 101). He concluded his testimony by stating that he did not see the bag taken from the car (Tr. 101-102).

Following argument on the motion (Tr. 102-114), the court credited Sergeant Shaw's testimony as trustworthy. It made a finding that Sergeant Shaw had probable cause to believe that the four occupants of the Plymouth had committed the burglary. The probable cause was predicated on Sergeant Shaw's plain view observation of the cash register coin tray (Tr. 114). Thereupon all the defendants waived their right to a jury trial (Tr. 114-117) and requested a trial by the court. In an attempt to eliminate the need to repeat testimony, all counsel stipulated that the testimony heard at the motion should be incorporated into and received as part of the trial itself (Tr. 115).

At trial Harold Sugar testified that he was the vice president and secretary of Dumbarton Pharmacy, Inc.[13] (Tr. 117). He stated that on August 9, 1969, at about 7:30 p.m. he left the pharmacy after having secured the premises and engaging its alarm system. After that time no one, including any of the defendants, had permission to enter the pharmacy (Tr. 118-119). Returning to the

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[12] According to Threadgill, in addition to other objects the bag contained coins scattered throughout. "Tarrance Johnson had the dollar bills" (Tr. 100).

[13] It was stipulated with the consent of each of the defendants that Dumbarton Pharmacy, Inc., was authorized to do business in the District of Columbia (Tr. 121-122).

pharmacy at 1:30 a.m. on August 10, he observed an officer positioned as a guard in front of the premises where "the door had been broken open and the door jamb had been torn out of the wall." Upon entering he discovered that two cases of watches and clocks, *inter alia*, had been taken from the front counter. He continued, "There was cash in the cash register [exceeding $95.00] that was missing including the change tray from one of the drawers, the one that cash had been in, and there were other items missing from a couple of show cases, and there was a film bag that I had looked for and that was missing, a large plastic bag." (Tr. 118-119.) After examining some of the items which were later received into evidence (Tr. 127), he testified that several boxes of soap to which price tags were attached, a unique calendar-date travel clock, a lady's silver wristwatch, the coin tray and plastic film bag all belonged to the Dumbarton Pharmacy. He also noted that the $88.10 which was recovered consisted of the usual volume of coins which would be collected at the end of a business day (Tr. 119-121).[14]

The items recovered from the Plymouth were received into evidence, and the Government rested its case (Tr. 127). Appellant, with whom his co-defendants joined, made a motion for a judgment of acquittal. He argued, as to the grand larceny count, that the absence of proof

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[14] Helen Frances Schafer was also called to testify for the Government. She testified that she lived across the street from the pharmacy, and that on August 10, 1969, shortly after midnight, she went to close her window because of the inclement weather outside. While at the window she observed four Negro males take shelter in the pharmacy vestibule. She continued to watch and saw three of the four force their shoulders against the door of the pharmacy until finally "the door went in" (Tr. 123). She saw all four of them enter the store and then called the police and reported what she observed. Then she returned to the window and from there saw the four men leave, one or two or whom were carrying a bag. Minutes later she saw a police patrol wagon traveling toward the store going west on Dumbarton Avenue, which is a one-way street running eastward (Tr. 124). However, she was unable to identify any of the four suspects (Tr. 125).

as to the value of the items found in the plastic bag left the Government with having proved that merely $88.10 was the subject of the theft. He concluded that the Government had failed to satisfy the $100 statutory requirement for grand larceny.[15] The court took notice of the volume of the items in the bag as well as the fact that Mr. Sugar had testified that the items had price tags attached to them. Those items were received in evidence with their price tags. It was noted further that two of the clocks had price tags of $16.95 and $8.99, respectively. When these amounts were added to the $88.10 seized from the car and Tarrance Johnson, the sum was in excess of the statutory requirement; accordingly, the court denied the motion (Tr. 128-129). Appellant and his co-defendants rested their cases without presenting any evidence and were found guilty as charged (Tr. 129-130).

ARGUMENT

I. The trial court properly denied appellant's motion to suppress evidence where the articles ruled to be admissible were observed in plain view by the arresting officer who was legitimately positioned beside appellant's automobile.

(Tr. 4-114)

Appellant's initial assignment of error is that the court erroneously denied his motion to suppress evidence which he contends was seized in violation of his Fourth Amendment rights. He asserts that there was no justification for the police to stop the car in which he was a passenger and that the stopping of the car constituted an arrest for which there was no probable cause. In our judgment appellant misreads the record and misconstrues the law.

At the outset it must be noted that the Plymouth automobile in which appellant was a passenger was not

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[15] 22 D.C. Code § 2201.

brought to a halt by pursuing police. Rather, the driver voluntarily brought it to a stop of his own accord [16] after he turned onto the final segment of Dumbarton Avenue which culminates in a dead end [17] (Tr. 38-39). But even if the Plymouth was brought to a halt by the initiative of the police, in the circumstances of this case we believe such a stop was absolutely appropriate. Indeed, in our view, the police were duty-bound to pursue that very course. *See Coleman* v. *United States*, 137 U.S. App. D.C. 48, 53, 420 F.2d 616, 621 (1969). Appellant concedes [18] that not every stop of a vehicle by the police amounts to an arrest of the vehicle's occupants. A momentary detention for investigative purposes under suspicious circumstances is both proper and imperative.

In the instant case the suspicions of the police were duly aroused. They had received a broadcast over the police radio that a burglary was in progress at the Dumbarton Pharmacy in the 3100 block of Dumbarton Avenue, N.W. The perpetrators were described as four Negro males (Tr. 7, 35-36). Seregant Shaw, intimate with the neighborhood, believed that the presence of four Negroes would "stand out" in that area [19] (Tr. 58). The

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[16] Consequently, an inquiry made by a police officer of a pedestrian who was not in a vehicle (*i.e.*, Tarrance Johnson) causes less of a detention than an inquiry of one who is in a car that is stopped by the police. Under appropriate circumstances, of course, both stops may be proper. *Compare, e.g., Terry* v. *Ohio*, 392 U.S. 1 (1968) *with United States* v. *Johnson*, —— U.S. App. D.C. ——, 442 F.2d 1239 (1971), and *Young* v. *United States*, 140 U.S. App. D.C. 333, 435 F.2d 405 (1970).

[17] Moreover, notwithstanding appellant's assertion that appellant's car was blocked by two or three police cars with six armed officers, the record is clear that only Sergeant Shaw and his partner, in one police car, were behind appellant when his car stopped (Tr. 39). Shortly thereafter another scout car appeared on the scene (Tr. 67), but the officers in that car remained on the sidelines (Tr. 71-73). Only after the arrest did Sergeant Johnson arrive (Tr. 9-10, 21, 69-70), contrary to appellant's contention at pages 21-22 of his brief.

[18] Brief for appellant at 22.

[19] See *footnote 5, supra.*

incident occurred at an early morning hour, shortly after midnight, and the area at that time was lightly populated (Tr. 8; see brief for appellant at 24). Within moments of the radio flash appellant and his co-defendants were seen within "six or seven car lengths" of the victimized store (Tr. 13). Of the two autos observed in that area at that time by Sergeant Johnson,[20] the one in which appellant was a passenger was the only one containing four Negro males (Tr. 13). Moreover, that car was missing its front license tag (Tr. 29). Their extremely close proximity both in time and place to the burglarized Dumbarton Pharmacy merited close scrutiny (Tr. 58). Cognizant of their function to protect society by preventing suspects from escaping with the loot from their crime, the police properly arranged to follow the vehicle and keep it under surveillance (Tr. 8-9, 36-37). In the course of that surveillance the car in which appellant was a passenger failed to stop at a stop sign (Tr. 37-38). That traffic violation alone would have provided ample justification for police action to bring the car to a halt.[21] *Allen* v. *United States*, 129 U.S. App. D.C. 61, 390 F.2d 476, *supplemental opinion*, 131 U.S. App. D.C. 358, 404 F.2d 1335 (1968). Subsequently, upon confirmation that a burglary in fact had been committed (Tr. 37-38), the police were obliged in the performance of their duty to stop the car. Such a stop, in the circumstances of this case, did not constitute custodial restraint amounting to an arrest. Rather, it was an investigative procedure by which the police could allay or confirm their suspicions. As such, it was proper.

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[20] Sergeant Shaw also responded to the pharmacy but, having taken a different route and arriving from the opposite direction, saw "three or four" automobiles (Tr. 56-58).

[21] Appellant argues that a stop for a traffic violation is a sham procedure. While we see no basis for that assertion, on this record we believe it is irrelevant. The fact that a fruit of the burglary was observed in plain view was sufficient to justify appellant's arrest. *United States* v. *Johnson*, *supra* note 16, —— U.S. App. D.C. at ——, 442 F.2d at 1243-1245; *cf. Hutcherson* v. *United States*, 120 U.S. App. D.C. 274, 345 F.2d 964, *cert. denied*, 382 U.S. 894 (1965).

Rios v. *United States*, 364 U.S. 253 (1969); *United States* v. *Johnson*, *supra* note 16; *Young* v. *United States*, *supra* note 16; *Coleman* v. *United States*, *supra*; *Allen* v. *United States*, *supra*.

Given the permissible nature of the street encounter, there was no search within the purview of the Fourth Amendment when Sergeant Shaw, from outside the car, saw in plain view a cash register coin tray exposed and protruding near the transmission hump on the car floor (Tr. 39-40). *Harris* v. *United States*, 390 U.S. 234 (1968); *United States* v. *Johnson*, *supra* note 16; *Young* v. *United States*, *supra*; *Creighton* v. *United States*, 132 U.S. App. D.C. 115, 406 F.2d 651 (1968); *cf. Coolidge* v. *New Hampshire*, 91 S. Ct. 2022 (1971). Mere observation is not a search. *United States* v. *Wright*, D.C. Cir. No. 23,060, decided April 19, 1971. Upon observing the coin tray, an item which to the trained eye of a police officer is not an uncommon fruit of a store burglary, *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Coleman* v. *United States*, *supra*; *Davis* v. *United States*, 133 U.S. App. D.C. 172, 409 F.2d 458, *cert. denied*, 395 U.S. 949 (1969); *Dorsey* v. *United States*, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967); *(Sammie) Jackson* v. *United States*, 112 U.S. App. D.C. 260, 302 F.2d 194 (1962); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958), probable cause to believe that appellant and his friends committed the burglary became manifest. *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967). Accordingly, the ensuing arrests were proper, and the subsequent searches incident thereto were valid.

II. The record clearly reveals that the testimony of Sergeant Shaw was eminently trustworthy.

(Tr. 21, 41, 57-61, 74-75, 81-82, 85-97, 99-100)

Appellant assails the testimony of Sergeant Shaw as having been inherently incredible and contrary to human experience. He asserts that the court committed error in crediting it as trustworthy in its finding of probable

cause. His argument is grounded on alleged inconsistencies between the testimony of Sergeant Shaw and that of Sergeant Johnson, Officer Williams and the co-defendant Threadgill. Appellant asserts that the claimed inconsistencies pertaining to the operative facts embraced in his arrest so impaired Sergeant Shaw's credibility that the court could not have found probable cause. We vigorously disagree. In our view, appellant egregiously distorts the record to reach his conclusion.

The standard for appellate scrutiny of the credibility of witnesses is well settled. The credibility judgment of the trial court, acting as finder of fact, should be honored by this Court unless it is clearly erroneous. *(Henry) Jackson* v. *United States*, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965); *accord*, *Dillane* v. *United States*, 127 U.S. App. D.C. 377, 384 F.2d 329 (1967). Even a cursory reading of the record belies appellant's contentions. It reveals that Sergeant Shaw's testimony not only was not inherently incredible but indeed was resolute and reliable. An examination of each of appellant's claims reveals their frailty, singly and combined.

1. Appellant's first assertion is that Sergeant Shaw was motivated to fabricate his testimony so that a ruling supported by his testimony would reduce the likelihood that he would be "faced with the charge of illegal conduct" (*i.e.*, he had a strong interest in the outcome of the case) (Brief for appellant at 32-33). It is ironic that appellant asserts that the testimony of Sergeant Johnson and Officer Williams was more credible than that of Sergeant Shaw, for such an assertion necessarily presupposes that they were not likewise motivated.[22] A mere adverse ruling on the issue of probable cause, of course, does not automatically subject a police officer to any "charge of illegal conduct." Their decisions are made in an instant and without the benefit of contem-

[22] His argument becomes specious when he asserts that the testimony of Threadgill, a defendant, whose interest in the outcome of the case was immediate and overriding, should have been accorded credibility above that of Sergeant Shaw (Brief for appellant at 36).

plative study. *Cf. Wayne* v. *United States*, 115 U.S. App. D.C. 234, 240-241, 318 F.2d 205, 211-212 (1963). The fact that their decision may ultimately be ruled to have been incorrect does not subject them to liability. We fail to understand how appellant can offer this argument, especially when he concedes that "Sergeant Shaw's degree of recall appears to have been fairly good, although he was unable to recall [what he characterizes as] some crucial things." He concedes further that Shaw's testimony "did not contain many internal inconsistencies." (Brief for appellant at 33.)

2. Appellant asserts that Sergeant Shaw "stated that his memory was better at the hearing on the motion [to suppress] than [it was during his earlier testimony] before the grand jury" (Brief for appellant at 33). That is a mischaracterization of what Shaw said. The record reveals that the inquiry pertaining to his memory, upon which appellant bases his argument, was at best unclear.[23] Consequently, the answer to the inquiry is probative of nothing. The matter was not pursued further, and the record does not reveal how the question was understood by the witness.

3. Appellant charges that Sergeant Shaw's testimony was incredible because he was unsure whether the dome light of the Plymouth provided additional light at the time he made his plain view observation. Again appellant misreads the record. Sergeant Shaw stated clearly that the quality of the illumination at that time was very satisfactory. "[T]he vehicle was pretty well lit where I could see that tray" (Tr. 74). There were two scout cars present, both with their headlights beaming, and in addition there was a street light nearby. The sergeant was certain of the quality of the light; he merely was not sure if the dome light of the Plymouth provided *additional* illumination (Tr. 41, 74-75).

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[23] Q. [by defense counsel]: Was your—your memory would be a little bit better now—then than it would now.
Is that right?
A. No. (Tr. 57.)

4. Citing Tr. 58-61, appellant states that Sergeant Shaw became defensive and altered the emphasis of his testimony when he was challenged on cross-examination. Such a conclusion is impossible on this record. Defense counsel made incessant efforts to put words in the mouth of the witness, but Sergeant Shaw was resolute in his responses. The record speaks for itself.[24]

5. Appellant claims that Sergeant Shaw's testimony is incredible in that the bandits took pains to hide their bounty carefully so that "it stretches credulity" that any portion of their loot would be exposed to the plain view of Sergeant Shaw (Brief for appellant at 33-34). Suffice it to say that the fact that thieves might be expected to be more clever and display greater wisdom and sophistication in their venture does not reduce Sergeant Shaw, who witnessed their blunder, to an inherently incredible witness. Moreover, to conclude that he was such a witness, one must completely ignore his testimony and credit only the testimony of the defendant Threadgill. See footnote 22, *supra*.

6. Appellant finds a material discrepancy between the testimony of Sergeant Shaw and that of Officer Williams as to whether Tarrance Johnson alighted from the Plymouth before or after Sergeant Shaw approached. He states, "Williams *unequivocally* disagreed with Shaw's statement that the driver, Tarrance Johnson, got out the car before Shaw got to it" (Brief for appellant at 34) (emphasis added). That representation is patently contrary to the record. The transcript divulges Officer Williams' actual response:

> Q. What happened next?
>
> A. Well, Officer Shaw got out of the car and told me to get out and he went up to the car and started a conversation with the driver.
>
> Q. Where was the driver, if you remember? Was the driver in the car or outside the car?

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[24] See appendix, *infra*, pp. 21-23.

A. *I can't say for sure.* (Tr. 88) (emphasis added).

It is clear that Officer Williams was uncertain as to when Tarrance Johnson alighted from the car. The fact that he later acquiesced in a leading question that he got of the car during the conversation (Tr. 91) does not eliminate his uncertainty. In any event, this brief exchange does not signify that Sergeant Shaw's testimony was fabricated. Even though Officer Williams' testimony may have been characterized by uncertainty (Tr. 85-97), that has no bearing on the quality and accuracy of the testimony of Sergeant Shaw.

7. Appellant argues that because the cash tray was of such size that it fit into the plastic bag and because Threadgill testified that the tray was in fact placed in the bag, Sergeant Shaw's testimony that he saw it protruding from the bag is incredible. This assertion will not withstand analysis either. Threadgill testified that the tray was placed in the bag by Tarrance Johnson with his aid (Tr. 99). Because Johnson was the driver of the car, and because Threadgill, who was seated in front of the car (Tr. 100), was the person who placed the bag under the seat in the rear of the car (Tr. 99), that procedure could not have taken place while the vehicle was in motion. It must therefore have occurred when they originally entered the car after leaving the pharmacy. Thus, even if Threadgill's testimony was accurate, it is not improbable that the passengers in the rear of the car, one of whom was appellant, in their haste and avarice may have opened the bag and withdrawn part of the tray to get an early start in counting the loot.[26]

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[26] Appellant argues that the failure of Sergeant Shaw to recall whether the bag or tray was wet from the rain (Tr. 81-82) is part of the matrix from which one should conclude that his testimony was incredible. He overlooks the fact that it could have been dried by the jacket that was covering it or, indeed, that it could never have become wet if it was concealed when taken from the pharmacy. His failure to recall that fact is irrelevant to any assessment of his credibility.

There is nothing whatsoever about Sergeant Shaw's observation of the exposed coin tray that could be called incredible.

8. Appellant further asserts that because only one of six officers who were present at the scene testified that the tray was observed in plain view, the testimony of that one officer (*i.e.*, Sergeant Shaw) is inherently incredible. That claim is vacuous. First, only three of the six officers who were present were called upon to testify. If appellant desired to hear the testimony of the others, he could have called them. Second, of the three officers who testified, only Sergeant Shaw approached the vehicle in which appellant was a passenger and in which the tray was exposed. Officer Williams, who stood at the rear of the vehicle, was unable to recall whether he saw the tray and did not believe that he ever got close enough to the car actually to peer inside (Tr. 96). Sergeant Johnson arrived on the scene after the tray was seen by Sergeant Shaw and was advised of its existence by Shaw (Tr. 21). There is no evidence that he looked into the car. Thus the only contradiction to Sergeant Shaw's testimony that the tray was exposed in plain view came from the defendant Threadgill, who said he originally concealed it. Surely that testimony alone does not render Shaw's testimony inherently incredible.

Appellee submits that none of these alleged discrepancies, singly or collectively, sheds such doubt on Sergeant Shaw's credibility that the acceptance of his testimony by the court was clearly erroneous. This Court therefore should follow the general rule enunciated in *(Henry) Jackson* v. *United States*, *supra*, 122 U.S. App. D.C. at 328, 353 F.2d at 866, that "normally as an appellate court, we accept the testimony of police officers and other witnesses credited by the trial court."

III. The government offered ample evidence that the value of the stolen items exceeded the $100 statutory minimum of grand larceny.

(Tr. 42-54, 117-121, 127-129)

Appellant's final contention is that the Government failed to prove that the value of the items stolen from the pharmacy exceeded the statutory requirement of $100. Accordingly, he urges this Court to reverse his conviction of grand larceny and remand the case to the District Court with instructions to enter a judgment of guilty of the crime of petit larceny.[26] Had the Government actually failed in its proof, we would of course not oppose this request. However, we are of the opinion that the evidence did establish that the value of the items taken exceeded the statutory minimum.

There was $88.10 seized in currency. Therefore, the Government was obligated to prove that the other items seized had a value of at least $11.90.[27] There were between ten and twelve articles found in the plastic bag. They were identified by Harold Sugar, the vice president and secretary of Dumbarton Pharmacy, Inc., as belonging to the pharmacy. Included among those items were a unique calendar-date travel clock and a lady's silver wristwatch (Tr. 120). Price tags were attached to the articles found in the bag, and they were received into evidence with the price tags still on them. Two clocks had price tags of $16.95 and $8.99, respectively (Tr. 129). The value of those two pieces of merchandise brought the total value of the items stolen above the requirement of $100.

It is for the trier of fact to determine the value of the items introduced into evidence. *Norman* v. *United*

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[26] 22 D.C. Code § 2202.

[27] Notably, Harold Sugar testified that a sum exceeding $95.00 was missing from the pharmacy (Tr. 121). It is not unreasonable to infer that appellant and his co-defendants were responsible for the theft of the additional monies as well. *See United States* v. *Coggins*, 140 U.S. App. D.C. 134, 433 F.2d 1357 (1970).

States, 126 U.S. App. D.C. 387, 379 F.2d 164 (1967); *Owens* v. *United States*, 115 U.S. App. D.C. 233, 318 F.2d 204 (1963). Because the evidence amply supports the conclusion of the trier of fact, its decision should not be disturbed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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APPENDIX

APPENDIX

The following is an excerpt of the cross-examination of Sergeant Shaw by defense counsel:

Q. So you are saying, Officer, that your main suspicion was that there were four Negro males in Georgetown in a homosexual area.

Is that right?

A. No, no.

I am not saying that at all.

I am saying that we had information that the crime had been committed by four Negro males and there were four Negro males in that car.

Q. But there was no other description of the four Negro males and no other description of a car.

There was no description of car at all.

A. Actually no description of a car at all.

Q. My question to you is then you talked to Officer Johnson?

A. Right.

Q. You testified here that there were three or four cars on that block. One of them held four Negro males.

We all know about that.

What about the other three cars? What did Officer Johnson tell you about them?

A. Well, see, Officer Johnson pointed out this particular car to me.

Q. In other words, your testimony—he didn't say anything about the other cars?

A. No, he didn't.

Q. And you are sure that there were more than two cars?

A. I—yes.

Q. You are positive?

A. I will say there were at least three cars.

Q. So Officer Johnson was wrong?

A. This is—possibly when the car passed him he couldn't actually see back—

Q. Officer Johnson did manage, Officer, he has testified that—

A. He has testified—he has testified to what he saw. I can only testify to what—

Q. And I am saying—

A. —I saw.

Q. —between the two of you, you are saying in your opinion Officer Johnson was wrong.

A. No, I am not saying that Officer Johnson was wrong.

THE COURT: I don't believe—

THE WITNESS: I am not saying that Officer Johnson was wrong.

I am testifying to what I saw. Officer Johnson testified to what he saw.

BY MR. GROVE [defense counsel]:

Q. It's a one-block area we are talking about. Right?

A. Right. It's—

Q. Cars parked on—

A. It's a very long block.

Q. Cars parked on both sides of the street?

A. Right.

Q One-way traffic.

Officer Johnson was stopped in the middle of the block. Officer Johnson was able to observe well enough to get and give to you a license number.

A. Right.

Q. Are you saying that you don't think that you and Officer Johnson could have observed the same thing?

A. Well, you are looking at it at different angles.

Officer Johnson was seeing something one way and I am seeing something another way.

You ask Officer Johnson what he saw. I am telling you what I saw.

Q. You are sure that there were three or four cars?

A. Yes.

Q. Just as sure of that as anything else you have testified to?

A. Yes.

Q. But you didn't look in the other three or four cars, did you?

A. No, I didn't, because Officer Johnson pointed out this particular car.

Q. So you just went on, didn't bother with the other three cars?

A. No, because I didn't—I didn't want to lose the car that he had pointed out to me. (Tr. 58-61.)

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